the position that these are purely civil actions.[13] Hence, in the latter jurisdictions it is said that the difference in the forms of procedure and the degree of proof required, prevent the criminal prosecution from barring the civil action.[14] But this argument seems doubtful when applied to the case of a prior conviction.[15] And though the result reached by this line of cases is correct, the true basis of double jeopardy depends not upon the form of the penal action, but upon the consideration of whether by the second suit the defendant's life or liberty, as distinguished from his property, is imperilled. This was the *ratio decidendi* of the recent case of *Stout* v. *State ex rel. Caldwell* (Okla. 1913) 130 Pac. 553. The court held that a suit to recover a penalty for an act which was also made a misdemeanor, punishable by fine and imprisonment, did not violate the constitutional prohibition of double jeopardy, since only the defendant's property interests were at stake. This principle is recognized in a number of jurisdictions in a line of analogous cases which hold that a verdict for the defendant in a criminal prosecution may be reversed when the punishment is merely pecuniary,[16] or is not infamous.[17] Likewise, statutes permitting the abatement of nuisances for the maintenance of which indictments will lie, have been held constitutional in several instances.[18] And in accord with this doctrine it is recognized that the imposition of a fine for the disregard of a mandamus order does not bar a subsequent prosecution for the defendant's misconduct.[19] It seems, therefore, that the tendency of some courts to extend the principle of double jeopardy to suits for the recovery of penalties is the result of a failure to recognize the logical limits of a doctrine intended as a protection of the person of the accused.

TITLE TO THE BEDS OF NAVIGABLE STREAMS.—The common law tendency to assign to the king all lands that had no determinable owner very early led the courts to place in the King the title to the bed of the sea,[1] and to all arms of the sea or rivers in which the tide ebbed and flowed.[2] Above tidewater, however, even where the river

[13]Grenada Lumber Co. *v.* State (1910) 98 Miss. 536; State *v.* West Plains Tel. Co. (1911) 232 Mo. 579.

[14]Adams *v.* Sigman (1906) 89 Miss. 844; People *v.* Snyder (N. Y. 1904) 90 App. Div. 422.

[15]But by some courts this general rule of *res judicata* has been held to have no application where the civil suit is brought to recover a part of the punishment denounced by the statute. United States *v.* Jaedicke (1896) 73 Fed. 100; but see State *v.* Meek (1910) 112 Ia. 338. This case supports Coffey *v.* United States, *supra.*

[16]Jones *v.* State (1854) 15 Ark. 261; see State *v.* Spear (1840) 6 Mo. 644, where it is held that the decision must be otherwise if the penalty is one which affects the life or liberty of the accused.

[17]Commonwealth *v.* Prall (1912), 146 Ky. 109.

[18]Micks *v.* Mason (1906) 145 Mich. 212, 11 L. R. A. [N. S.] 653; State *v.* Roach (1910) 83 Kan. 606, 31 L. R. A. [N. S.] 670, 21 Ann. Cas. 1182.

[19]People *v.* Meakim (1892) 133 N. Y. 214.

[1]Hale, De Jure Maris, ch. 4; Moore, Foreshore and Seashore (3rd ed) 671 *et seq.*

[2]Royal Fishery of the Banne (1610) Davies 149; Bulstrode *v.* Hall (1663) 1 Sid. 148, 149; Shively *v.* Bowlby (1893) 152 U. S. 1; 1 Farnham, Waters & Water Rights 247 *et seq.*

was navigable, the bed, to the thread of the stream, belonged to the riparian proprietor; but his title was subject to the paramount right of the public to use the stream for navigation.[3] In this country, while recognizing that the common law criterion of the state's proprietorship was the presence of the tide, many courts have declared that the real principle underlying that test was actual navigability;[4] and that the ebb and flow of the tide was only a rough test of navigability, which might well be applied in England where practically all navigable rivers are subject to the tide's influence, but which is wholly inapplicable to the great water-ways of America.[5] By analogy, therefore, to the extension of admiralty jurisdiction by the Supreme Court of the United States,[6] these courts hold that wherever waters are in fact navigable, though not arms of the sea, their beds are owned in fee by the state.[7] But it is to be noted that the common law conception of the King's title did not depend on the usefulness of the stream for purposes of navigation, because all navigable rivers, even if their beds were privately owned, were subject to the public easement of navigation;[8] and that, although the distinction between tidal and navigable waters was recognized by the common law, only tidal lands were assigned to the state.[9]

In non-tidal navigable waters at common law, the public had no interests except those which were connected with navigation.[10] All other rights were vested exclusively in the owner of the river-bed.[11] Apparently, the desire to open to the public the advantages arising from the legal incidents of that ownership was instrumental in leading courts to repudiate the common law rule. But even the American courts

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[3]Hale, De Jure Maris, ch. 1; Ewing *v.* Colquhoun (1877) L. R. 2 A. C. 839. Grants of land bounded by the margin of rivers above tide waters are presumed to carry the title of the grantee to the thread of the stream, unless the terms of the grant clearly manifest the grantor's intention to the contrary. Fulton L. H. & P. Co. *v.* State (1911) 200 N. Y. 400; Steamboat Magnolia *v.* Marshall (1860) 39 Miss. 109.

[4]McManus *v.* Carmichael (1856) 3 Ia. 1; Ill. Cent. R. R. *v.* Illinois (1892) 146 U. S. 387; Cooley *v.* Golden (1893) 117 Mo. 33.

[5]Ravenswood *v.* Fleming (1883) 22 W. Va. 52; Ill. Cent. R. R. *v.* Illinois, *supra.*

[6]Genesee Chief *v.* Fitzhugh (1851) 12 How. 443; see Barney *v.* Keokuk (1876) 94 U. S. 324.

[7]Carson *v.* Blazer (Pa. 1810) 2 Binn. 475; Elder *v.* Burrus (Tenn. 1845) 6 Humph. 358; see Schurmeier *v.* St. Paul R. R. (1865) 10 Minn. 82, affd. (1868) 7 Wall. 272; see cases cited in notes 4 and 5, *supra.*

[8]Murphy *v.* Ryan (1868) Ir. Rep. 2 C. L. 143; Ewing *v.* Colquhoun, *supra;* Steamboat Magnolia *v.* Marshall, *supra;* Adams v. Pease (1818) 2 Conn. 481.

[9]Mayor of Lynn *v.* Turner (1874) Cowp. 86; see Glover *v.* Powell (1854) 10 N. J. Eq. 211; Kinkead *v.* Turgeon (1906) 74 Neb. 573, 580; 1 Farnham, Waters & Water Rights § 50.

[10]Ewing *v.* Colquhoun, *supra;* Adams *v.* Pease, *supra.*

[11]At common law the exclusive right to fish followed the title to the bed of the stream. Hale, De Jure Maris, ch. 3; Murphy *v.* Ryan, *supra;* Pearce *v.* Scotcher (1882) L. R. 9 Q. B. D. 162; Beckman *v.* Kreamer (1867) 43 Ill. 447. Similarly, the right to take ice belonged exclusively to the owner of the bed. Wood *v.* Fowler (1882) 26 Kan. 682. Islands springing up in a river were governed by the same rule. See note to Wilson *v.* Watson (Ky. 1910) 35 L. R. A. [N. S.] 227.

which still apply the common law doctrine have not hesitated to broaden the scope of the public use of these waters, irrespective of the ownership of the bed.[12] And the recurring argument that state ownership is necessary to prevent private interference with navigation,[13] may easily be rebutted by the fact that the sovereign's right to regulate navigation is well-nigh absolute.[14] Consequently most of the courts in eastern jurisdictions, where non-tidal rivers are of little importance, deny that public policy requires a change of the common law rule. And although they concede the arbitrary nature of a test of ownership which is founded upon the presence or absence of the tide,[15] they retain it, because it furnishes a permanent disposition of the title, which will not vary with every change of the river's course.[16] Moreover, the courts which declare the fee of the beds of non-tidal navigable waters to be in the state are not agreed as to the bounds of the riparian owner's title. Some have placed the line of demarcation at the highest point the water ever reaches.[17] By the weight of authority, however, his title extends to low-water mark,[18] although he is often allowed but a qualified title to the space between high and low-water mark.[19] The inextricable confusion in which this subject is involved is due not only to conflicting ideas as to the correct common law principle to be applied, but to controlling legislative declarations often inferred from the form of a single grant by the state.[20] In the recent case of *Strawberry Island Co.* v. *Cowles* (1912) 140 N. Y. Supp. 333, it was held that although the common law rule was in force in New York,[21] it was not applicable to the Niagara River, on the ground that it formed an international boundary. The fact that the river is an international boundary, however, does not alter the situation,[22] since the state's sovereignty over

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[12] Willow River Club *v.* Wade (1898) 100 Wis. 86; Lincoln *v.* Davis (1884) 53 Mich. 375; see Smith *v.* Rochester (1883) 92 N. Y. 463.

[13] Ill. Cent. R. R. *v.* Illinois, *supra.*

[14] Kinkead *v.* Turgeon, *supra.* It includes the power to remove obstructions, Hannibal Bridge Co. *v.* United States (1910) 221 U. S. 194, to erect dikes, Gibson *v.* United States (1897) 166 U. S. 269, and to dredge channels to improve navigation. Lewis Blue Point Oyster Co. *v.* Briggs (1910) 198 N. Y. 287; see 12 COLUMBIA LAW REVIEW 489.

[15] Cobb *v.* Davenport (1867) 32 N. J. L. 369, 380.

[16] Kinkead *v.* Turgeon, *supra;* Adams *v.* Pease, *supra;* Lorman *v.* Benson (1860) 8 Mich. 18; Gavit *v.* Chambers (1828) 3 Ohio 495; Johnson *v.* Johnson (1908) 14 Idaho 561.

[17] McManus *v.* Carmichael, *supra.*

[18] Brown Oil Co. *v.* Caldwell (1891) 35 W. Va. 95; Schurmeier *v.* St. Paul R. R., *supra;* Carson *v.* Blazer, *supra;* Elder *v.* Burrus, *supra.*

[19] Bailey *v.* Miltenberger (1856) 31 Pa. 37.

[20] See Canal Appraisers *v.* People *ex rel.* Tibbits (N. Y. 1836) 17 Wend. 571.

[21] The Common law rule applies to all rivers in New York except the Mohawk, Hudson and Niagara Rivers. The first two are governed by an assumed civil law. Canal Appraisers *v.* People *ex rel.* Tibbitts, *supra;* Fulton L. H. & P. Co. *v.* State, *supra.*

[22] See United States *v.* Chandler-Dunbar Co. (1907) 209 U. S. 447. The bed of the Detroit river, forming an international boundary, is in the riparian owner. Lorman *v.* Benson, *supra.* The title to beds of rivers forming state boundaries are governed by the general rule of the state. The Mississippi River bed belongs to the riparian owner in Wisconsin,

the bed of a stream is complete even if the title to the bed is in the riparian owner. It becomes difficult therefore to support the principal case otherwise than as a result of legislative declarations with respect to the Niagara River.[23]

VALIDITY OF STATE RETROSPECTIVE LEGISLATION.—Retrospective legislation is often unjust, in many cases oppressive, and has always been held in high disfavor.[1] The courts of this country, following the early English decisions,[2] refuse to give to a law a retroactive operation, even when no constitutional guaranties are violated, unless compelled so to do by clear and imperative language of the legislature,[3] and many of the state constitutions contain express provisions against legislation of this character.[4] The nearest approach to this inhibition in the Federal Constitution is the clause against *ex post facto* laws, but that was early held to apply only to criminal matters,[5] and this principle is now accepted as an axiom in the science of jurisprudence. Hence, as the "Due Process of Law" clause of the Fifth Amendment does not apply to the states[6] they were, prior to the passage of the Fourteenth Amendment, restricted in the enactment of retrospective legislation only in so far as it was *ex post facto* or impaired the obligation of contracts.[7] It was under this amendment that the recent case of *Ettor* v. *City of Tacoma* in the Supreme Court of the United States,[8] presented the question whether a statutory right of action was a vested right which could not be abridged by a retrospective law. A statute of Washington authorized a municipality to establish an original grading of the street, but provided that it should compensate abutting owners for resulting damages. After the grading, and pending the plaintiff's action, the provision of the statute requiring the payment of compensation was repealed. The court held that the plaintiff had a vested property right in the chose in action, and the attempt

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Franzini *v.* Layland (1903) 120 Wis. 72; in Illinois, Middleton *v.* Pritchard (1842) 4 Ill. 510; in Mississippi, Steamboat Magnolia *v.* Marshall, *supra;* but to the state in Iowa, McManus *v.* Carmichael, *supra;* in Minnesota, Castner *v.* Steamboat Dr. Franklin (1852) 1 Minn. 73.

[23]See Matter of Commissioners of State Reservation (N. Y. 1885) 37 Hun 537, 547.

[1]See Sutherland, Statutory Construction, § 641.

[2]See Helmore *v.* Shuter (1678) 2 Show. K. B. 16; Couch *v.* Jeffries (1769) 4 Burr. 2460.

[3]See Dash *v.* Van Kleeck (N. Y. 1811) 7 Johns. 477, 503; Osborne *v.* Huger (S. Car. 1791) 1 Bay 179; Sutherland, Statutory Construction § 642.

[4]See Constitution of Ohio, Art. 2, § 28; Constitution of Colorado, Art. 2, § 1; Dow *v.* Norris (1827) 4 N. H. 16.

[5]Calder *v.* Bull (1798) 3 Dallas 386. This is clearly opposed to the view of Chancellor Kent, who after referring to this decision says: "Yet laws impairing previously acquired rights are equally within the reason of that prohibition, and equally to be condemned." See Dash *v.* Van Kleeck, *supra,* at p. 505.

[6]Barron *v.* Baltimore (1833) 7 Pet. 243.

[7]See Davidson *v.* New Orleans (1877) 96 U. S. 97.

[8]Not yet reported.